(8)

NO. 91-1657

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CHARLENE LEATHERMAN, ET AL.,

Petitioners,

V.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, ET AL.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CITY OF COLLEGE STATION, TEXAS' AMICUS BRIEF

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QUESTIONS PRESENTED

1. May a complaint against a local government entity brought under 42 U.S.C. section 1983 be dismissed for failure to plead specific factual allegations supporting governmental liability?

(a) Whether dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure of an action brought pursuant to 42 U.S.C. section 1983 based upon a "heightened pleading" requirement is violative of Rule 8 of the Federal Rules of Civil Procedure or the Rules Enabling Act, 28 U.S.C. section 2072(b)?

(b) Whether a complaint will withstand a motion to dismiss brought pursuant to Rule 12(b)(6), even though it contains only conclusory allegations that track the requirements of a cause of action, unaccompanied by any notice as to the facts upon which the claim is allegedly based?

LIST OF PARTIES

PETITIONERS

Charlene Leatherman and Kenneth Leatherman, individually and as next friend of Travis Leatherman; Gerald Andert; Kevin Lealos and Jerri Lealos, individually and as next friend of Travor Lealos and Shane Lealos, Pat Lealos, and Donald Andert.

RESPONDENTS

The Tarrant County Narcotics Intelligence and Coordination Unit; Tarrant County, Texas; Tim Curry, in his official capacity, and Don Carpenter, in his official capacity; City of Lake Worth; and City of Grapevine, Texas.

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STATUTES AND RULES INVOLVED

Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part:

> **(a) Claims for Relief.**
>
> A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, . . .
>
> **(b) Pleading to be Concise and Direct: Consistency.**
>
> Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.
>
> **(c) Construction of Pleadings.**
>
> All pleadings shall be so construed as to do substantial justice.

Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law, and that it is not interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The Rules Enabling Act, Title 28, United States Code, Section 2072 provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right.

STATEMENT OF THE CASE

Petitioners Charlene Leatherman and Kenneth Leatherman, individually and as next friend of Travis Leatherman ("Leatherman plaintiffs") filed suit alleging that Respondents Tarrant County Narcotics Intelligence and Coordination Unit ("TCNICU"), Tarrant County, Texas ("Tarrant County") and the City of Lake Worth, Texas ("Lake Worth") violated their constitutional rights in connection with Respondents' search of their residence. The

allegations against these three Respondents stem from the shooting of Petitioners' dogs during the search.

TCNICU filed a motion to dismiss the original complaint pursuant to Rule 12(b)(6). The District Court dismissed the complaint for failure to state a claim. The District Court later vacated the dismissal, providing the Leatherman plaintiffs with additional time to amend to cure the inadequacies. The basis of the rescinded dismissal was that the Leatherman plaintiffs had failed to allege any facts to support the existence of a policy or custom which would overcome the defendant governmental entities' absolute immunity and subject them to liability. In its opinion, the District Court specifically directed the plaintiffs' attention to the Fifth Circuit's heightened pleading requirement for 42 U.S.C. 1983 cases.

Taking advantage of the opportunity to replead, the Leatherman plaintiffs did try to allege a custom and policy when they added Gerald Andert, Kevin Andert, Kevin Lealos and Jerri Lealos, individually and as next friends of Travor and Shane Lealos, Pat Lealos and Donald Andert (collectively the "Andert plaintiffs"), and new defendants, Tim Curry and Don Carpenter, in their official capacities as Director of TCNICU and the Sheriff

of Tarrant County, and the City of Grapevine ("Grapevine").

TCNICU, Curry, Carpenter and Grapevine subsequently moved to dismiss pursuant to Rule 12(b)(6). The District Court granted the motion and dismissed the amended complaint pursuant to the rule. At the time the District Court also ruled that summary judgment under Rule 56 was also proper. The Court found no evidence of the existence of a governmental policy or custom which supported the decision. Petitioners' argument against summary judgment was the inability to pursue discovery. Respondents and the District Court pointed out that this discovery was not made.

The decision was appealed to the Court of Appeals for the Fifth Circuit. In affirming the judgment, the Court of Appeals, relying upon the heightened pleading requirement, determined that the Petitioners' complaint was inadequate in that it failed to state any specific facts to support its claim of inadequate training.

ARGUMENT

The bottom line of the requirement of particularity in pleadings is that it protects governmental entities against respondent superior liability under 42 U.S.C. 1983 sought to be imposed by

plaintiffs who cannot hope to prove that a custom or policy gave rise to the constitutional violation. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The Supreme Court has clearly articulated that it will not impose municipal liability for the constitutional violation of a nonpolicymaking officer without more than the allegation of that violation. *Oklahoma City v. Tuttle*, 471 U.S.808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). Attempts to impute causation have been rejected by the Supreme Court. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

> Nevertheless, proper analysis requires us to separate two different issues when a 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.

Collins v. City of Harker Heights, Texas, ___ U.S. ___, ___, 112 S.Ct. 1061, 1063 (1992).

The Supreme Court should affirm the adoption of the heightened pleading requirement by the Court of Appeals for the Fifth Circuit and other circuits. Although the term may not be used, most of the other circuits have a particularized pleading

requirement. *Smith v. Nixon*, 807 F.2d 197 (D.C. Cir. 1986); *Siegert v. Gilley*, 895 F.2d 797, (D.C. Cir. 1990) *affirmed*, 111 S.Ct. 1789 (1991); *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990); *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989); *Ostrer v. Aronwald*, 567 F.2d 551 (2nd Cir. 1977); *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978); *Arnold v. Board of Education*, 880 F.2d 305 (11th Cir. 1989).

The heightened pleading requirement imposed by the Fifth Circuit provides protection to local officials and governments from vexatious and expensive lawsuits based upon form book pleadings. *Elliot v. Perez*, 751 F.2d 1472 (5th Cir. 1985); *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987). The heightened pleading requirement does not conflict with the Rule 8 notice pleading, but rather it conforms to the reasonable inquiry into the facts requirement of Rule 11.

> Cases such as *Elliott*, where the immunity to suit of governmental officials is at stake, present a special and acute subset of the general run. In view of the enormous expense involved today in litigation, however, of the heavy cost of responding to even baseless legal action, and of Rule 11's new language requiring into the facts of the case by an attorney *before* he brings an action, applying the stated rule to all 1983 actions as much to recommend it.

Rodriquez v. Avita, 871 F.2d 552, 554 (5th Cir. 1989).

This pleading requirement is actually a requirement that pleadings not be conclusory. *Harlow v. Fitzgerald*, 457 U.S. 800 (1987); *Anderson v. Creighton*, 483 U.S. 636 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Petitioners have not shown that they have a claim that is more than conclusory. Petitioners' failure to train allegations, made pursuant to the Supreme Court's decision in *City of Canton, Ohio v. Harris*, 489 U.S.378, 109 S.Ct. 1197 (1989), are cursory in nature, made without evidence of an actual custom or policy.

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. See *Oklahoma City v. Tuttle, supra,* at 823, 105 S.Ct. at 2436 (opinion of REHNQUIST, J.). Thus, permitting cases against cities for their "failure to train" employees to go forward under 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities - a result we rejected in *Monell*, 436 U.S., at 693-694, 98 S.Ct. at 2037. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism. Cf. *Rizzo v. Goode*, 423 U.S. 362, 378-380, 96 S.Ct. 598, 607-608, 46 L.Ed.2d 561 (1976).

City of Canton, Ohio v. Harris, 489 U.S.378, 391-392, 109 S.Ct. 1197, 1206 (1989).

This failure of the Petitioners to allege any facts in support of the elements - specific training deficiency, nexus that represents policy and close relationship to the injury - particularly after amendment and opportunity to conduct discovery, is a sound basis for dismissal for failure to meet pleading requirements. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Although not immune, the municipality and therefore its taxpayers should not be subject to expensive litigation on the allegation of a single or even two incidents involving nonpolicymaking officials without the allegation of facts that show the elements of a cause of action. *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987).

Moreover, this failure to show evidence of the elements of failure to adequately train, policy and nexus to the injury is clearly a basis for the grant of summary judgment. *Celotex Corp. V. Catrett*, 447 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *McKee v. City of Rockwall, Texas*, 877 F.2d 409 (5th Cir. 1989).

CONCLUSION

The decision of the Fifth Circuit Court of Appeals is unquestionably supported by the pleadings, evidence, and relevant law. Applicable legal principles of pleading and summary judgment with regard to municipal civil rights liability were followed and applied. For these reasons and those specifically discussed above, the Supreme Court should uphold the judgment of the lower court.

Respectfully submitted,

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